

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 45 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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STATE OF GUJARAT

Versus

KALU HIMAT PATEL and 2 Ors.

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Appearance:

Mr. M.A.Bukhari, A.P.P. for the appellant.

Mr. A.D.Shah for the respondents.

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CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 09/12/96

ORAL JUDGEMENT : (Panchal,J.):-

By means of filing this appeal under section 378 of the Code of Criminal Procedure,1973, State of Gujarat has challenged judgment and order dated October 10,1984, rendered by the learned Additional Sessions Judge,

Amreli, in Sessions Case no. 23/84 acquitting the respondents under sections 302, 147, 148, 149/34 of the Indian Penal Code.

2. The original informant Valkubhai Kathad is resident of village Nana Rajkot. On May 16, 1984, he had gone to Office of Gujarat Electricity Board situated at Gariadhar. After attending the Office, he was returning and proceeding towards S.T. Depot when one Bholabhai Valkubhai of village Nana Rajkot encountered him and informed that Nankubhai Hamir was assaulted at village Nana Rajkot by Kalubhai Kanbi and others of village Shakhapur with axe and other weapons and that in order to remove him to Hospital at Liliya, it was necessary to make arrangement for a vehicle. Valku Kathad, therefore, hired vehicle of Maganbhai Gujarati and went to village Nana Rajkot. On the shedha of a field known as 'Piplawadi' he found Takhubhai Hamir and his sister Faibaben present and also noticed that Nanku Hamir was lying in a profusing bleeding condition between the road leading from Nana Rajkot to Shakhpur. Takhubhai Hamir informed Valkubhai that Nanku was dead and there was no need to take him to Hospital, but he should go to Liliya Police Station in order to lodge complaint. Informant Valku Kathad, therefore, went to Liliya Police Station via. Gariadhar and lodged First Information Report. P.S.I. Mr. Shashikant Patel noted down the complaint and proceeded to village Nana Rajkot. The investigating officer visited the place of occurrence and prepared panchnama of place of occurrence and also held inquest on the dead body. Mr. Patel also recorded statements of witnesses who were found conversant with the facts of the case. The investigating officer thereafter went to village Shakhpur and arrested accused Balu Naran and Ashok Naran. Accused Kalu Himat and Himat Harji were arrested on May 31, 1984 and incriminating articles were recovered from them under different panchnamas. The dead body was sent for autopsy and incriminating articles were sent to Forensic Science Laboratory for the purpose of analysis. After obtaining necessary reports and on completion of investigation, the investigating officer submitted chargesheet against the accused under sections 302, 147, 148, 149/34 of the Indian Penal Code in the Court of learned Judicial Magistrate, First Class, Lathi. As the offence under section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions, the case was committed to Sessions Court for trial and was numbered as Sessions Case no. 23/84 in the Court of learned Additional Sessions Judge, Amreli.

3. The learned Additional Sessions Judge framed

charge against the accused at exh.1 under sections 302, 147, 148, 149/34 of the Indian Penal Code. The charge was read over and explained to the accused, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined (1) Dr.V.P.Patel, P.W.1, exh.12, (2) Valku Kathad, PW.2, exh.14, (3) Chadbhai Jivabhai, PW.3 exh.16, (4) Pragji Karshanji, PW.4, exh.20, (5) Kalyan Premji Patel PW.5, exh.23, (6) Arjanbhai Meghji, PW.6, exh.24, (7) Jilu Nanji, PW.7, exh.26, (8) Devku Nanku, PW.8, exh.28, (9) Faibaben Hamirbhai, PW.9, Exh.29, (10) Vinubhai Chhaganlal, PW.10, exh.31, (11) Vajirbhai Mohmad PW.11, exh.34, (12) Valkubhai @ Bholabhai Ogadbhai, PW.12, exh.35, (13) Dr. Savjibhai Mohanbhai Sidhpura, PW.13, exh.36, (14) Vinodrai Bhimji, PW.14, exh.43, (15) Tribhovandas Kuberbhai Patel, PW.15, exh.46, and (16) Shashikant Manibhai Patel, PW.16, exh.47, to prove its case against prosecution.

4. The prosecution also relied on documentary evidence such as postmortem notes exh.13, inquest panchnama exh.17, panchnama of place of occurrence exh.18, discovery panchnamas prepared under section 27 of the Indian Evidence Act during the course of investigation, medical certificate of Himat Hiraji, dying declaration of respondent no.1 etc. to prove its case against the accused.

5. After recording of evidence of prosecution witnesses was over, the learned Judge questioned the accused generally on the case and recorded their statements under section 313 of the Code of Criminal Procedure, 1973. In their statements the accused denied the case of prosecution. In his further statement as well as written statement exh.63 accused no.1 pleaded that when he in the company of others was returning after taking sample of soil from the field and when they reached kharaba land, he was assaulted by Nanku with an axe on his back and when he turned around, another blow was dealt with by the axe on his head. Accused n.1 claimed that he had a spear in his hand and when deceased Nanku was attempting to give 3rd blow by axe, he apprehended that the deceased would kill him and, therefore, in order to save his life, caused injury by spear to the deceased. It was asserted by him in his further statement as well as in the written statement that deceased Nanku caught hold of the spear and snatched it away from him, whereas he snatched the axe from the hand of the deceased and when the deceased was about to cause injury by spear, he caused injury to the deceased by means of axe to save his self. The accused no.1 also

stated that Devku Nanku, who is son of the deceased, had also attempted to cause injuries to him by means of pick-axe and when his father, who is accused no.2 in the present case, tried to intervene, Devku had caused injury to his father by means of pick-axe. However, none of the accused led any evidence in defence.

6. On appreciation of evidence led by the prosecution, the learned Judge held that deceased Nanku died a homicidal death. The learned Judge found that accused had not formed an unlawful assembly, common object of which was to commit rioting. The learned Judge concluded that prosecution failed to prove that the accused had committed offences punishable under sections 147 & 148 of the Indian Penal Code. Similarly, it was held that prosecution failed to prove that the accused had committed offence punishable under section 302 read with section 149/34 of the Indian Penal Code. Having noted the injuries on the person of accused no.1 and one injury on the person of accused no.2, the learned Judge held that the accused had acted in self-defence and had not committed any offence as alleged by the prosecution. In view of these conclusions, the learned Judge acquitted the respondents by the impugned judgment, giving rise to the present appeal.

7. Initially, acquittal appeal was filed against all the five accused. The appeal was placed for admission hearing before the Court and at the time of hearing of the appeal, it was not pressed against original accused nos.3 to 5. The appeal was ordered to be admitted against original accused nos.1 & 2 only.

8. Mr. M.A.Bukhari, learned A.P.P. has taken us through the entire evidence on record. It was pleaded that the evidence does not indicate that the deceased caused apprehension in the mind of the respondents that he would cause death or grievous hurt to them and, therefore, right of self-defence was not available to them. It was contended that the evidence of two eye witnesses, namely, Devku Nanku, who is son of the deceased and Faibaben Hamirbhai, who is sister of the deceased, unerringly points out guilt to the accused and, therefore, the appeal deserves to be allowed. In the alternative, it was pleaded that the respondents no.1 & 2 had exceeded right of self-defence and, therefore, after finding them guilty under section 304 Part-I of the Indian Penal Code, appropriate sentence should be imposed on them.

9. Mr.A.D.Shah, learned Counsel for the respondents

no.1 & 2 submitted that the evidence of two eye witnesses is thoroughly unreliable and untrustworthy as indicated by the learned Judge in the impugned judgment and, therefore, State appeal should be dismissed. It was argued that the explanation about injuries on the persons of accused nos.1 & 2 given by the prosecution witnesses is not satisfactory and as the prosecution has suppressed genesis of the occurrence, benefit of doubt given by the learned Judge should not be disturbed by the Court while hearing this appeal. What was emphasised by the learned Judge was that the medical evidence clearly establishes that accused no.1 had sustained grievous injuries, whereas accused no.2 had also sustained injuries which probablised the version of the accused that they had acted in their self-defence and, therefore, the appeal should be dismissed.

10. We have gone through the sworn testimony of Devkubhai carefully. His presence all throughout the incident at the place of occurrence becomes doubtful, as the version of the incident as stated by him does not get corroboration from the medical evidence. This witness has asserted that accused no.1 had inflicted 2 to 3 blows with spear and thereafter accused nos.2 to 5 had inflicted axe blows on different parts of body of the deceased. However, medical evidence shows only two axe blows on the body of the deceased and other injuries are possible by a spear. The conduct of eye witness Devji during the incident and even after the incident was not only strange, but unnatural. Not only he did not help or try to prevent infliction of blows on his father, but he did not go to his village which is situated just nearby and inform people and/or other family members about the incident. His evidence shows that he did not give details of incident, such as, names of the accused and weapons used by them to concerned persons. Even he failed to inform informant Valku Kathad that he and Faibaben, who is sister of the deceased, had actually witnessed the incident. During the course of his examination he did not offer any explanation regarding injuries sustained by accused nos.1 & 2. The learned Judge has rightly noted that belated explanation given by the witness during the course of his deposition, is material improvement and unreliable. Having regard to the nature of evidence of this witness, we are of the opinion that the learned Judge has not committed any error in disbelieving the witnesses on material particulars.

11. Similarly, the evidence of Faibaben, sister of the deceased, who claims to be an eye witness, also suffers from several discrepancies. She has claimed

in her evidence that on receiving one blow by spear deceased Nanku fell down and thereafter rest of the blows were given by other accused with axe. However, this part of her version stands completely contradicted by nature of injuries noticed by the medical officer. In her cross-examination, she has denied any knowledge about the incident having been narrated by Takhubhai to informant Valkubhai Kathad. Though she has tried to explain the injuries sustained by the accused, explanation offered by her is not trustworthy. Having regard to the totality of the circumstances, we are of the opinion that her evidence is not reliable and is correctly discarded by the learned Judge. Moreover, the sworn testimony of complainant Valku Kathad and the contents of the First Information Report do not support the claim of two eye witnesses. It is relevant to note that in the F.I.R. accused nos. 2 to 5 were not named at all. The F.I.R. does not disclose names of eye witnesses also. In the F.I.R. it was mentioned that Takhubhai Hamirbhai who was brother of the deceased, had all details about the incident, but till the informant left the place of occurrence to lodge complaint, neither Takhubhai nor Faibaben had the details of information nor any of them gave any details to the complainant about the incident. It may be mentioned that prosecution has not examined Takhubhai Hamirbhai and no reasons whatsoever are assigned by the prosecution for his non-examination.

12. The documentary evidence on record establishes that deceased Nanku had a grudge against accused no. 1, who had applied to the police and feared grabbing of the land by the deceased. Having regard to the nature of injuries sustained by the accused no. 1 & 2, we are of the view that explanation given by the prosecution witnesses regarding injuries sustained by the accused, is not satisfactory and is no explanation in the eye of law. Under the circumstances, the finding recorded by the learned Judge to the effect that the prosecution has suppressed genesis of occurrence is eminently just and is hereby upheld.

13. Involvement of original accused nos. 3, 4 & 5 is not established by the prosecution and, therefore, case against them was not pressed by the appellant at the time when the appeal was placed for admission hearing. No incriminating circumstance against them was proved by the prosecution. Their prosecution indicates tendency on the part of witnesses to exaggerate and involve persons falsely in the case. A reference to medical evidence makes it abundantly clear that injuries no. 5, 11 & 12 sustained by the deceased could have been caused while

snatching the spear. The evidence of Dr. Savji Sidhpara recorded at exh.36 shows that accused no.1 had one incised injury on left parietal region 2" above eye-brow of the size 2" x 1/2" by bone deep, and one incised wound on back of the size of 2 1/2" x 1/2" bone deep. According to the Doctor, the injuries were possible by sharp cutting instrument. The X-Ray plates produced at exhs.38 to 40 show that accused no.1 had sustained fracture. The evidence of medical officer further shows that he had also examined accused no.2 and found contusion over lateral aspect of left elbow 2 1/2" x 1" transverse. According to Doctor, the injury sustained by accused no.2 was possible by hard and blunt substance. The record establishes beyond doubt that accused no.1 was in serious condition and, therefore, his dying declaration was recorded by Executive Magistrate Mr. Vinod Bhimji Gathani whose deposition is recorded in the case at exh.43. This witness has produced declaration of accused no.1 at exh.45. The evidence of P.S.I. Amreli City Police Station shows that he had gone to Civil Hospital in connection with Entry no.313/84 and recorded complaint as stated by accused no.1 and had registered offences against the accused. In his statement under section 313 of the Code of Criminal Procedure, 1973 as well as written statement exh.63, accused no.1 pleaded that when he in the company of others was returning after taking sample of soil from the field and when they had reached kharaba land, he was assaulted by Nanku with an axe on his back and when he turned around, another blow was dealt with by the axe on his head. Accused no.1 claimed that he had a spear in his hand and when deceased Nanku was attempting to give 3rd blow by axe, he apprehended that the deceased would kill him and, therefore, in order to save his life he caused injury by spear to the deceased. It was asserted by him in his further statement as well as in the written statement that deceased Nanku caught hold of the spear and snatched it away from him and therefore, he snatched axe from the hand of the deceased and when the deceased was about to cause injury by spear, he caused injury to the deceased by means of axe to save his self. Accused no.1 had also stated that Devku Nanku, who is son of the deceased had also attempted to cause injuries to him by means of kodali and when his father who is accused no.2 in the present case, tried to intervene, Devku had caused injury to his father by means of Kodali. Dr. Patel who had performed autopsy, has stated in his evidence that injuries nos.5,9 & 11 were such which could have been caused during the course of scuffle. On the facts and in the circumstances of the case, we are of the opinion that the defence as pleaded by both the accused, is fully

probablised by medical evidence.

14. It is an admitted position that Chapter Cases were registered against the deceased and others by P.S.I. Mr.Patel and the deceased was directed to execute bond for an amount of Rs.1000/- and to be of good behaviour for a period of one year. The evidence of P.S.I. Mr.Patel further indicates that C.R.No.48/82 was registered against the deceased,his brother Takhubhai Hamirbhai and others for the offences punishable under sections 447, 379, 506(2) of the Indian Penal Code. The evidence of police officer also shows that in the year 1982 C.R.no.55/82 was registered against the deceased for the offence punishable under section 506(2) of I.P.C.; whereas C.R.no.10/83 was registered for the offences punishable under sections 447 & 379 of I.P.C. Again, C.R.no.24/83 was registered against the deceased and his brother Takhubhai for the offences punishable under sections 447 & 379 of I.P.C. His evidence also indicates that offence punishable under the provisions of the Bombay Prohibition Act was also registered against the deceased in the year 1983. Having regard to the nature of evidence led by the parties, we are inclined to believe that the deceased was in the habit of selling his land and thereafter grabbing possession of the same under one pretext or other. As accused no.1 was attacked by the deceased from back and front with dangerous weapon like axe, we are of the opinion that it cannot be said that accused no.1 had exceeded in any manner right of self-defence which was available to him. As the prosecution suppressed the origin and genesis of the occurrence,it cannot be said that any error is committed by the learned Judge in applying the principle laid down in the case of LAXMISINH & Ors. vs. STATE OF BIHAR, AIR 1976 S.C. 2263 to the facts of the present case. The reasons which are enumerated by the learned Judge in the impugned judgment for acquitting respondents no.1 & 2 are not erroneous at all and do not call for interference by the Court in the present appeal.

15. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal.Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given



by the learned Judge, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & Ors. vs. BIJENDRA NARAIN CHAUDHARY, A.I.R. 1967 S.C. 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge. Therefore, acquittal appeal deserves to be rejected.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal bail to be disposed of in terms of direction given by the learned Judge in the impugned judgment. Bail Bonds stand cancelled.

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